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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1094

MARIE H. HAMM, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

WILLIAM HAMM, JR., *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Marie H. Hamm and William Hamm, Jr., pray that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cases on December 30, 1963.

CITATION AND OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported in 325 F. 2d 934 (1963). A copy of said opinion may be found in the appendix.

The opinion of the Tax Court of the United States is a memorandum opinion, P-H Memo T.C. 1961, Vol. 30, reported in paragraph 61, 317. Since the opinion of the Tax Court appears in the record certified for the use of the Court of Appeals, said opinion is not appended to this petition but is omitted in accordance with Rule 23 (3) (i) of the rules of this Court.

JURISDICTION

Judgments of the Court of Appeals were dated and entered on December 30, 1963. The time within which this petition for writs of certiorari is to be filed with this Court has been extended from March 30, 1964 to and including May 13, 1964 by order of Mr. Justice White dated March 2, 1964. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Where the issue before the Tax Court is the valuation for gift tax purposes of shares of capital stock of a closely held corporation, is a finding by the Tax Court that the gift has a value of "not less than" a stated amount in compliance with the requirement of Section 7459 (b) of the *Internal Revenue Code of 1954* and Rule 52 (a) of the *Federal Rules of Civil Procedure* that the Tax Court "find the facts specially"?

2. In such a case is the Tax Court required by said Section 7459 (b) to set forth in its findings or memorandum the standards or factors employed in making its ultimate determination of value?

STATEMENT OF THE CASE

Petitioners are husband and wife and residents of Minnesota. In 1953 Mr. Hamm made gifts, consisting of a minority stock interest in a closely held corporation, to two trusts. Petitioners filed a timely gift tax return in which they consented, as provided in Section 1000 (f), Int. Rev. Code of 1939, to splitting the said gifts between them for tax purposes. The cases were consolidated for trial in the Tax Court, for purpose of review by the Court of Appeals, and in this Court under its rules of practice.

The subject matter of the gift to one trust was 130 shares, and to the other trust 133⅓ shares of common stock of United Properties Incorporated, a Minnesota corporation (hereinafter called United). The stock was valued at $100 per share in the gift tax returns. Upon examination by the Internal Revenue Service the value was adjusted upward from $100 a share to $8,506.40 a share.

The tax involved in the Marie H. Hamm case is the sum of $317,281.96, and the sum of $456,138.53 is involved in the William Hamm case.

United's issued and outstanding stock consisted of 1,000 shares of common and 35,000 shares of cumulative preferred stock. Neither stock, from the inception of United through 1953, had ever been listed on any stock exchange or traded in any market, nor had there ever been any sale of any shares of either class of stock.

United's principal business activity was the management of real estate held by it for investment. It held considerable real estate, some by fee title and some as lessee under long term leases.

United also held all or substantially all of the shares of capital stock of eight subsidiary corporations, each of which conducted a separate business enterprise. Included in these subsidiaries were a retail department store, a sales finance and consumer loan company, an insurance company and automobile dealerships.

The Tax Court, in a 79 page opinion, found an exact value for each of United's underlying assets, including its separate pieces of real estate and the capital stock of each of its subsidiaries. The court's findings also included ample detail as to the standards used in arriving at each value for the underlying assets of United.

However, as to the ultimate question—that is, the fair market value of the minority stock interest in United, the Tax Court concluded only that:

> "* * * the fair market value of United's common stock on the material valuation date *was not less than* $8,506.40 per share; * * *." (Emphasis added.)

Nowhere in its opinion does the Tax Court state a finding or conclusion as to the exact dollar value of the stock.

Further, nowhere in the Tax Court decision can there be found an explanation of the standards employed by the Court in reaching its conclusion as to the value of the minority interest in United's stock. Rather than presenting an explanation of its reasoning process in arriving at an ultimate conclusion, the Tax Court merely recited a list of factors claimed to have been taken into account without any sug-

gestion as to how these factors were evaluated to reach an ultimate conclusion.

Thus, the Tax Court stated:

> "* * * we state that among the factors or elements of value to which we have given consideration, are the following: The organization and history of United Properties, Inc.; its capital structure, the nature of its business, and the manner in which such business was operated; the number of outstanding shares of each class of the company's capital stock, and the identity of the shareholders; the number of shares transferred in making each of the gifts here involved; the fact that United's shares were not listed on any exchange, were not dealt in through brokers or in over-the-counter trading, and had not been the subject of any sales; the character and amounts of United's assets and liabilities; the fair market values of its underlying assets; the amounts and trends of its annual earnings, and the prospects for future earnings; its dividend paying history, and the prospects for future dividend payments; and all other factors which, in our view or that of the witnesses, tend to have an effect on the value of the shares of stock here involved, on the material valuation date." (Op. Par. 81, 347, P-H Memo T.C. at 61-2005).

Before the Eighth Circuit the taxpayers took no issue with the Tax Court's findings as to the fair market value of the underlying assets of United. Taxpayers did challenge the absence of a definite finding as to value, and also the absence of findings or opinion disclosing any reasoning process on the part of the Tax Court.

REASONS FOR GRANTING THE WRITS

This case raises two important and constantly recurring problems arising out of decisions by the Tax Court of the United States in cases involving the valuation of property (specifically, closely held corporate stock) for tax purposes. Those questions are:

(1) Whether the Tax Court has discharged its function of finding the facts specially by finding that property has a value of "not less than" a specified figure; and

2) Whether the Tax Court is required to set forth in its findings the standards employed in making its ultimate determination of value.

Section 7459 (b) of the *Internal Revenue Code* requires that the Tax Court include in its decision upon any case "its findings of fact or opinion, or memorandum opinion". Rule 52 (a) of the *Federal Rules of Civil Procedure* requires the lower courts to "find the facts specially". Section 7482 (a) of the *Internal Revenue Code* grants the United States Courts of Appeals jurisdiction to review the decisions of the Tax Court in the same manner and to the same extent as decisions of the District Court in civil actions tried without a jury. That section is geared to Rule 52 (a) *Federal Rules of Civil Procedure*. *Commissioner v. Duberstein*, 361 U.S. 923, 80 S. Ct. 291 (1959); 362 U.S. 907, 80 S. Ct. 1196 (1960). See also *Wisconsin Memorial Park Co. v. Commissioner*, 255 F. 2d 731 (7th Cir. 1958).

Valuation questions are frequently litigated in the Tax Court, arising not only out of income tax cases but also gift tax and estate tax cases.

The Tax Court has often failed to discharge its duty of finding the facts specially in valuation cases by a conclusory finding, just as it did in this case, that the property in question had a value of "not less than" a specified amount.

Also important to the sound administration of justice in valuation cases is the principle that the Tax Court be required to set forth the process by which its ultimate valuation determination is reached. The necessity for this principle in reaching a final determination was recently enunciated sharply and clearly by this Court in a land valuation case arising out of eminent domain proceedings, *United States v. Merz* (decided February 24, 1964).

This need is as great or even greater in cases involving the valuation of shares of closely held corporate stock because of

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[1] During the 14 year period 1949 through 1962 the Tax Court decided 95 cases requiring the valuation of closely held corporate stock. Standard Research Consultants, *Corporate Security Values as Determined by the Tax Court* (1963) (345 Hudson Street, New York 14, N. Y.) No statistics on the number of other types of valuation problems have been located but such cases are numerous. See, e.g., Bonds, *Giles E. Bullock*, 26 T.C. 276, Affirmed (2 Cir. 1958), 253 F. 2d 715, 1 A.F.T.R. 2d 1378; *E. S. Dillard*, par. 61,030, P-H Memo. T.C. Leasehold, *Mary Young Moore*, par. 55,219, P-H Memo T.C. Franchise, *Theodore E. Moberg*, 35 T.C. 773; aff'd in part and rev'd in part without discussion on valuation (9 Cir. 1962), 310 F. 2d 782, 10 A.F.T.R. 2d 5974. In addition, many valuation cases are presented to the District Courts and the Court of Claims. See e.g., Fair market value of fractional real estate interests, *Peters v. U. S.* (D.C. Calif. 1958), 2 A.F.T.R. 2d 5910; Good will, *General Outdoor Advertising Co., Inc. v. U. S.* (1957), 138 Ct. Cl. 605, 149 F. Supp. 463, 50 A.F.T.R. 1927, cert. den. 12-9-57; Closely held stock, *O'Malley v. Ames* (8 Cir. 1952), 196 F. 2d 256, 42 A.F.T.R. 19, aff'g (D.C. Neb.) 91 F. Supp. 463, 39 A.F.T.R. 735; *Bader's Estate v. U. S.* (D.C. Ill. 1949), 172 F. Supp. 833, 3 A.F.T.R. 2d 1220.

the complexity of the factors which can be involved.[2]

The Tax Court decision, as it now stands affirmed by the Eighth Circuit, leaves the basic fact issue of the litigation in doubt, not only for the taxpayers themselves but also for certain related persons,[3] for the Internal Revenue Service[4] and for the State of Minnesota.[5]

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[2] The Revenue Service has listed eight factors to be examined in determining the fair market value of closely held stock. *Rev. Ruling 59-60, Cum. Bull. 1959-1, p. 237*, superseding *Rev. Rul. 54-77, Cum. Bull. 1954-1, 187*. A tabulation of Tax Court decisions reflects 32 different factors mentioned by that court in various cases. Standard Research Consultants, Inc., *Corporate Security Values as Determined by the Tax Court* (1963).

[3] Other taxpayers owning common stock in United Properties Incorporated made gifts of said stock in 1955 and 1956. Counsel for those taxpayers have commenced action in the United States District Court for the District of Minnesota for tax refunds on behalf of such taxpayers. *Marie H. Ankeny v. George O. Lethert, District Director of Internal Revenue for the District of Minnesota* (Docket #3-64-134) and *DeWalt H. Ankeny v. George O. Lethert, District Director of Internal Revenue for the District of Minnesota* (Docket #3-64-133). Had the Tax Court made an exact determination in the instant case setting forth the factors used in arriving at its valuation, perhaps further litigation would have been unnecessary.

[4] In order to compute taxpayers' gift tax liability in future years it is necessary to take into account the precise value of gifts made in 1953. Since this value was not established by the Tax Court decision, the Commissioner of Internal Revenue in later years may take the position that the value of the 1953 gift per share was more than $8,500.40. Similar situations have developed in rulings by the Internal Revenue Service in court decisions to the effect that valuation determined in an estate tax return is not conclusive for the purpose of determining gain or loss upon subsequent sale of property. *See Ford v. United States*, 276 F. 2d 17 (Ct. Cl. 1960); *Northport Shores, Inc. et al.*, 31 B.T.A. 1013; *Rev. Rul. 54-97, Cum. Bull. 1954-1, p. 113*.

[5] The State of Minnesota in administering its income tax law usually adopts the findings of the Tax Court on issues which are pertinent to Minnesota income tax determination. The failure of the Tax Court to make a precise valuation invites further litigation on the valuation issue for state tax purposes.

It appears unwise to give sanction to the Tax Court practice of finding that a value in question is "not less than" a specified figure in view of the fact that it will foment and not terminate litigation.

A finding that the value is "not less than" a specified figure indicates on its face that the mental processes of the Court did not reach an ultimate conclusion as to the actual value of the property in question.

The Circuit Courts of Appeal have been unable to agree as to the propriety of this Tax Court practice.

In the instant case, the Eighth Circuit was of the opinion that the Tax Court's determination:

> "* * * as a practical matter, certainly equates with a finding that the value of the stock was the stated figure and not ungently hints that the taxpayers might well consider themselves fortunate that it was not higher."

The Eighth Circuit also stated that the Tax Court's finding:

> "* * * although phrased in 'not less than' language, possesses sufficient definiteness to meet the requirements of §7459 (b) and Rule 52 (a), to advise and inform the taxpayers appropriately, and to constitute an acceptable finding as to value."

While it is possible that the Tax Court judge did conclude the value to be $8,507.00, there is also the possibility that he reached no specific conclusion at all.

As to Circuit Courts other than the Eighth, some decisions have sanctioned the Tax Court's practice of not making a definite finding, while others have disapproved.

The Second Circuit, in the case of *Richardson v. Commissioner*, 151 F. 2d 102 (1945), affirmed a decision by the Tax Court that stock had "a fair market value of not less than" a specified amount. However, it does not appear from the opinion that the Court's attention was specifically called to the fact that this "finding" was defective.

The Seventh Circuit, in the case of *Gross v. Commissioner*, 92 F. 2d 621 (1937), was presented with a similar finding to the effect that the petitioner had failed to prove that the stock in question had

> "* * * any fair market value less than that determined by the respondent."

In that case the Seventh Circuit dealt with the situation much as did the Eighth Circuit in the instant case, by ignoring the absence of a definitive finding, stating:

> "While we regard this as a rather awkward expression, yet we think it is the equivalent of an affirmative statement that the stock had a fair market value of $10,400 and shall so treat it."

On the other hand, the Ninth Circuit in at least three cases has flatly rejected the practice of the Tax Court in failing to "find specially". In *Albert Gersten v. Commissioner*, 267 F. 2d 195 (1959),[9] the Tax Court found that the contracts in question had a fair market value "equal to at least" the amount determined by the Commissioner. The Ninth Circuit held that this did not constitute a finding of fact as to the fair market value and reversed the case for further consideration; stating:

> "This does not constitute a finding of fact as to the fair market value."

The Ninth Circuit recognized clearly the problems presented by the failure of the Tax Court to make a definitive finding, stating:

> "This is a serious problem for the taxpayer. If the fair market value as of date of dissolution be overestimated,

[9] See also *Cohen v. Commissioner*, 266 F. 2d 5 (9 Cir. 1959); *Shoenwell v. Commissioner*, 238 F. 2d 148 (9 Cir. 1952). An earlier view was expressed by the Ninth Circuit in *Pinn v. Commissioner*, 219 F. 2d 18 (9 Cir. 1955).

taxpayer might be subject to capital gain taxes which the event will not justify. If underestimated, taxpayer may be subjected to payment of ordinary income taxes on sums received in excess of fair market value figure set. These factors do not control or have bearing upon the problem before the court, but do highlight its seriousness."

The court went on to say:

"The cause must therefore be remanded upon this phase to the Tax Court to permit the taking of further testimony to determine whether any fair market value can be found in the light of the cases relied upon by taxpayers and the necessity of setting an exact and accurate sum in dollars and cents."

The practice of the Tax Court in making indefinite findings of value are the direct concern of this Court, for sound and uniform judicial administration of the Federal Revenue Laws is vital. The conflict between the circuits on this point should be resolved.

Equally important, the Tax Court should be required to reveal the reasoning used in arriving at a particular valuation. *United States v. Merz* (supra). As this Court there ruled, a review of a finding of valuation is not possible unless the trier of fact indicates the path taken through the maze of conflicting evidence to reach a conclusion. In this case both the reasoning and any firm conclusion are missing.

In affirming the decision of the Tax Court in the instant case, the Eighth Circuit dismissed the taxpayers' contentions that the Tax Court's listing of the factors considered was inadequate and that the court should be required to set forth its reasoning process, by stating:

"We feel that the taxpayers' argument here comes down to a demand for a formula. Formulas, however, are only

> tools. With the kind of evidence present here, we need not, and do not, go so far as to require that a detailed computation leading to the determined value be present in the Tax Court's findings."

Petitioners submit that the decision here is in direct conflict with the decision of this Court in the case of *United States v. Merz*. It is also contrary to the decision of several Circuit Courts passing on Tax Court determinations.

The Ninth Circuit, in the case of *Cohen v. Commissioner*, 266 F. 2d 5 (1959), stated as follows:

> "Where the Tax Court makes a deficiency determination it must weigh all elements which are entitled to consideration: Bedoglaur v. Commissioner, supra, 230 F. 2d at page 340. But it is not sufficient to discuss these elements in a general way, as the Tax Court has done in the decision here under review. While it is permissible to employ approximations where this is necessary, the findings and decision should reveal the arithmetic employed by the court in reaching its final figure. That was not done here, and there is no way we can determine what weight was given to the factors discussed by the Tax Court in arriving at its determination."

The Fourth Circuit, in *Estate of Albert E. MacKinnon v. Commissioner*, 240 F. 2d 811 (1956), reversed and remanded to the Tax Court, which found that the taxpayer's gross income was in certain amounts but did not state the facts upon which the ultimate finding was made, and stated:

> "The decision appealed from will accordingly be vacated and the case will be remanded to the Tax Court with direction to find the facts upon which the conclusions of the court are based, and with leave to hear additional evidence and to enter such judgment as upon the facts as found may be appropriate in the premises."

Likewise, the Fourth Circuit in the case of *Timmons v. Commissioner*, 198 F. 2d 142 (1952), remanded to the Tax Court for additional findings sufficient to support the ultimate conclusion, pointing out:

> "* * * Without such finding it is impossible for us to review intelligently the decision of the trial court. We could, of course, retry the case ourselves and wade through the hundreds of pages of testimony and exhibits for the purpose of finding initially the basis and evidentiary facts; but this is a function which can be better performed by the trial court which has had the advantage of seeing and hearing the witnesses."

In view of the conflict between the decision of the Eighth Circuit in the instant case, the decisions in the Fourth and Ninth Circuits, and more importantly the very recent decision of this Court in the case of *Merz v. United States*, certiorari should be granted to enable this Court to enunciate the standards to which the Tax Court should be required to adhere in valuation cases.

It should be noted that the decision here was issued by the Eighth Circuit before this Court's decision in *Merz*. Had the Eighth Circuit the benefit of *Merz* it might well have remanded the case to the Tax Court instead of affirming.[1]

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[1] Under the circumstances consideration might be given to remanding to the Eighth Circuit for further review in light of the principles enunciated by this Court in *Merz*.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 17,121

Marie H. Hamm,
Petitioner,
v.
Commissioner of Internal Revenue,
Respondent.

No. 17,122

William Hamm, Jr.,
Petitioner,
v.
Commissioner of Internal Revenue,
Respondent.

Petitions to Review Decisions of the Tax Court of the United States.

[December 30, 1963]

Before SANBORN and BLACKMUN, Circuit Judges and STEPHENSON, District Judge

BLACKMUN, Circuit Judge.

The Tax Court has upheld asserted deficiencies in the 1953 federal gift taxes of Marie H. Hamm and William

Hamm, Jr., in the respective amounts of $317,281.96 and $456,138.53. Judge Pierce's opinion, 79 pages in length and not reviewed by the full court, is T. C. Memo 1961-347. Each taxpayer has petitioned for review.

The Hamms are husband and wife and residents of Minnesota. Each filed a timely gift tax return for 1953. By these returns they consented, as § 1000(f) of the Internal Revenue Code of 1939 permitted, that gifts made by either of them to third persons during the year might be considered as having been made one-half by each.

The reported 1953 gifts were made by Mr. Hamm to two trusts created under separate declarations executed by him on July 18 of that year. The first gift to each trust consisted of $40,000 in cash at its inception. The second gift to each trust was made on December 30, 1953; it consisted of 130 shares, for one trust, and 133⅓ shares, for the other trust, of common stock of United Properties, Incorporated. This stock was valued at $100 per share in Mr. Hamm's return. The division of the gifts between husband and wife; the assertion, under § 1004(a)(2)(B); of deductions for a claimed charitable portion of the gifts; and the taking into account of net gifts made in prior tax years, resulted in the payment of 1953 gift taxes upon the returns as filed of approximately $8,600 for Mrs. Hamm and $13,200 for Mr. Hamm.

The substantial deficiencies upheld by the Tax Court are attributable (a) to the upward adjustment of the value of the United common from the returned figure of $100 per share to $8,506.40 per share and (b) to the disallowance of the deductions for the claimed charitable portions.

The charitable feature is not in contest on this review so we are confronted with only the valuation issue. As a conse-

quence, the provisions of the trust instruments are of no great import here. It suffices merely to say that the declaration for the one trust provides that net income until March 1, 1964, is to be paid to The Hamm Foundation, Inc.; that from March 1, 1964, through 1969, net income is to be accumulated; and that on January 1, 1970, the trust corpus and the accumulations are to be distributed to the taxpayers' son Edward, if living, or, if not, to issue or other named alternate beneficiaries. The declaration for the second trust contains parallel provisions except that the taxpayers' son William is the principal individual beneficiary.

United is a Minnesota corporation organized in December 1937. Shareholders of Theo. Hamm Brewing Company, Saint Paul, caused United to be formed so that it could hold real estate and other property formerly held by the brewing company. Later United acquired additional real estate and other interests.

At all times from its inception and through 1953, United's issued and outstanding stock consisted of 1,000 common shares and 35,000 cumulative preferred shares. Each class had a $100 par value. Neither was listed on any stock exchange or traded over the counter. No sale of United stock was effected prior to the trial.

When United was formed both its common and preferred shares were issued two-fifths to Mr. Hamm and one-fifth to each of his three sisters. By December 1953 the holdings of United's stock had become more diversified in the sense that some shares were then held by children and trustees. The 2-1-1-1 ratio as between family branches, however, remained. The December gifts by Mr. Hamm did not change this family ratio although they eliminated his personal holding of common.

United's directors for the five years preceding the gifts consisted of Mr. Hamm, the husbands of two of the sisters, and the taxpayers' attorney; its officers were the same two brothers-in-law, the attorney, and two others.

United's articles provide that its voting power is vested solely in the common; that holders of the preferred have no right to vote for any purpose; that the preferred is entitled to semi-annual dividends of 3½% which are cumulative without interest; that no dividend on common may be paid until all delinquent dividends on preferred have been paid; that in the event of liquidation holders of preferred have preference over common shareholders to the extent of the preferred's par value plus all unpaid dividends; and that any or all of the outstanding preferred is redeemable at any time at the option of the directors at $105 per share plus accumulated dividends.

The amount necessary to satisfy the annual dividend requirement on the preferred is $245,000. Some preferred dividends, always less than this annual requirement, were paid by United through its fiscal year 1941 but none was paid thereafter. As of December 31, 1953, the accumulated and unpaid preferred dividends were $3,685,500. No dividends were ever paid on the common.

On the date of the gifts United held either title or long term leases for 68 parcels of real estate, most of which were improved properties located in the City of Saint Paul. It also then held all or substantially all the shares of 8 corporations with businesses located in or near Saint Paul. Two of these were each the parent of a wholly owned subsidiary. United also held cash, marketable securities, notes, contracts, and mortgages receivable, interests in oil and gas properties, and other assets. Its operations consisted primarily of holding

and managing its real properties, holding the shares of its subsidiaries and its oil and gas interests and other properties, and receiving the rents, dividends and other income from these investments. It did not manufacture or produce any product. It did not act as a dealer in real estate, securities, or other property. It seldom sold any investment.

The Tax Court found that United's underlying net assets had a fair market value on the date of the gifts of $18,870,456. *This finding is not challenged by the taxpayers here.* The details of this computation of underlying asset value are set forth at length in the Tax Court's opinion and they need not be repeated here.

From this underlying net asset value figure the Tax Court deducted a total of $7,185,500 consisting of $3,500,000 for the par value of the outstanding 35,000 preferred shares plus the $3,685,500 preferred dividend arrearages. This left $11,684,956 as that portion of the underlying net asset value allocable to the 1,000 shares of outstanding common, or $11,684.96 for each common share.

It will be observed that the Tax Court, in determining the capital amount attributable to the preferred, did not include an additional $5 per share for the premium required if the preferred were to be redeemed. If this $5 increment, or $175,000, were taken into account, then the computation results in an underlying net asset value of the $11,509.96 ($11,684.96 less $175) allocable to each share of common.

As stated above, the Commissioner in his statutory notice of deficiency had determined that the value of the gift common was $8,506.40 per share. The Tax Court, obviously directing itself to this determination by the Commissioner, and in view of its finding of underlying net asset value par share

of common, made an ultimate finding that the value of the gift common "was, at the time of the gifts, not less than $8,506.40 per share" and held that the taxpayers had failed to establish error as to this determination of value.

The taxpayers emphasize that gifts were minority interests in the voting stock and that the usual problems incident to the valuation of a minority interest in a closely held corporation are made even more complicated here by (1) the nature of the underlying assets, viz., a large number of real estate parcels concentrated in one area and stocks of wholly owned subsidiaries which also have never been the subject of a sale; (2) the existence of the preferred and its substantial dividend arrearages; and (3) United's obligations under long term leases for a total rent liability in excess of $24,000,000, the existence of which renders liquidation impossible. The taxpayers then raise four points: (1) that the Tax Court failed to find the facts specially and to state separately its conclusions of law thereon; (2) that it failed to make any finding as to the actual market value of United Common; (3) that it failed to make any finding as to the value of a minority interest in the United Common; and (4) that the evidence compelled a finding that the market value of a minority interest in that stock was $735 per share.

Before discussing these points we note the principles, most of them well established, to which the parties refer. A presumption of correctness attends the Commissioner's deficiency determination and, apart from fraud, the taxpayers have the burden of showing it to be incorrect. *Wickwire v. Reinecke*, 275 U.S. 101, 107 (1927); *Welch v. Helvering*, 290 U.S. 111, 115 (1933). The clearly erroneous standard applies to findings made by the Tax Court. *Idol v. Commissioner*, 319 F.2d 647, 651 (8 Cir. 1963). When a gift is made in property its

value at the date of the gift governs for gift tax purposes. Section 1005 of the 1939 Code. For stocks the value is fair market value. Regulations 108, § 86.19. "Fair market value is the price at which property would change hands in a transaction between a willing buyer and a willing seller, neither being under compulsion to buy nor to sell and both being informed". *O'Malley v. Ames*, 197 F.2d 256, 257 (8 Cir. 1952); *Arc Realty Co. v. Commissioner*, 295 F.2d 98, 103 (8 Cir. 1961). Valuation of stock for tax purposes is a matter of "pure fact". *Pepper v. Commissioner*, 219 F.2d 18, 20-21 (9 Cir. 1955); *Arc Realty Co. v. Commissioner*, supra, p. 103 of 295 F.2d; *Gamble v. Commissioner*, 101 F.2d 565, 567 (6 Cir. 1939), cert denied 306 U.S. 664. And it "is ever one of fact and not of formula". *In re Nathan's Estate*, 166 F.2d 422, 425 (9 Cir 1948); *Collins v. Commissioner*, 216 F.2d 519, 522 (1 Cir. 1954); *Snyder's Estate v. United States*, 285 F.2d 853, 861 (4 Cir. 1961). The "absence of market price is no barrier to valuation". *Guggenheim v. Rasquin*, 312 U.S. 254, 258 (1941); *Whittaker v. Commissioner*, 82 F.2d 569, 574 (8 Cir. 1936).

The Tax Court is the trier of the facts; the judge of the credibility of witnesses and of the weight of the evidence, and the drawer of appropriate inferences. *Commissioner v. Scottish American Investment Co.*, 323 U.S. 119, 123-25 (1944); *Helvering v. National Grocery Co.*, 304 U.S. 282, 294 (1938). An appellate court's powers of review are limited "and that limitation is particularly narrow when the issue is one of value". *Sisto Financial Corp. v. Commissioner*, 149 F.2d 268, 269 (2 Cir. 1945); *Arc Realty Co. v. Commissioner*, supra, p. 103 of 295 F.2d.

Many relevant factors in the determination of value are listed in Mertens, Law of Federal Income Taxation, Volume

10, §59.21. Pertinent factors have been noted by this court in *Fitts' Estate v. Commissioner*, 237 F.2d 729, 731-32 (8 Cir. 1956), in *Art Realty Co. v. Commissioner*, supra, p. 163 of 295 F.2d, and in *O'Malley v. Ames*, supra, p. 258 of 197 F.2d. One might say in general that these factors are the things that a buyer and a seller would wish to know and consider before reaching a conclusion as to fair value. This court has said that "there is no single formula universally applicable in determining such value and in the absence of evidence of an open-market for stock it is proper to consider all the circumstances connected with the corporation in determining its fair market value". *O'Malley v. Ames*, supra, p. 258 of 197 F.2d.

Section 7459(b) of the Internal Revenue Code of 1954, applicable here (see §7851(a)(6)(A)(iv) of that Code), places upon the Tax Court the duty to make written findings of fact. Section 7482(a) and Rule 52 (a), F.R. Civ. P., require that the Tax Court "find the fact specially". *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960); *Ibco Realty Co. v. Commissioner*, 306 F.2d 207, 209 (8 Cir. 1962).

In addition to these settled legal principles there are elements in this case which, after a careful review of the stipulated facts, the many exhibits, and the fairly voluminous and technical record, impress us initially and appear to have pertinence generally to the points raised by the taxpayers. These elements are: (1) United common's underlying asset value being in excess of $11,500 per share, whether the $5 call price increment is utilized or ignored; (2) the taxpayers' concession of the validity of this underlying asset figure; (3) the substantial difference of $3,178.56 (or $3,003.56) per common share, amounting to approximately 27%, between this under-

lying asset figure and the determined value figure of $8,506.40; (4) the impressive list of factors taken into consideration by the Tax Court* in making its ultimate finding of value and in weighing the value opinions expressed by the several expert witnesses; and (5) the realization that the four points raised by the taxpayers are essentially interrelated.

With this as background, we consider the four points:

1. Finding the facts specially. The taxpayers argue that "substantial evidence" as to value was submitted by both parties; that because of this any presumption of correctness of the Commissioner's deficiency determination passed from the case; that there is no way of ascertaining how the Tax Court

* In its opinion the Tax Court said:

"We have, in making said ultimate finding as to value, carefully considered all the evidence pertaining to the present issue, including the stipulations of fact, the testimony of all witnesses presented by each of the parties, and the numerous exhibits received in evidence which included area maps, corporate records, financial statements and other data pertaining to the problem before us. We also have analyzed all said evidence and given due weight to each item or portion thereof. Most of the facts established by the evidence have hereinabove been set forth in considerable detail in our Findings of Fact; and, while we believe that no useful purpose would be served by making an extended review of the same here, we state that among the factors or elements of value to which we have given consideration, are the following: The organization and history of United Properties, Inc.; its capital structure, the nature of its business, and the manner in which such business was operated; the number of outstanding shares of each class of the company's capital stock, and the identity of the shareholders; the number of shares transferred in making each of the gifts here involved; the fact that United's shares were not listed on any exchange, were not dealt in through brokers or in over-the-counter trading, and had not been the subject of any sales; the character and amounts of United's assets and liabilities; the fair market value of its underlying assets; the amounts and trends of its annual earnings, and the prospects for future earnings; its dividend paying history, and the prospects for future dividend payments; and all other factors which, in our view or that of the witnesses, tend to have an effect on the value of the shares of stock here involved, on the material valuation date."

arrived at its value determination; that although the court listed in general terms several factors it said it had taken into consideration, it cannot be determined what weight it gave to any of these; that this strikingly contrasts with its valuation findings as to the underlying assets; that the importance of this contrast is evidenced by the discovery of the "$175,000 error" as to the call premium, a discovery made possible because the court detailed its method of valuing the underlying assets; that the court's failure deprives the taxpayers of the right to know if there has been a judicial review of the Commissioner's administrative determination; that an approach based on underlying asset value, when appropriately discounted, produces a result less than the Commissioner's figure; that one based on price-earnings ratios on consolidated 5-year average earnings or on 1952 earnings produces a result out of line with those prevailing for leading American companies; and that the court did not find the facts specially but pronounced a conclusion and nothing more. A number of cases are cited where valuation details and weighting factors are apparent from the opinions.

This argument is all very well so far as it goes. It is fundamentally, however, an argument for the trier of fact and not one for a reviewing court. It overlooks the fact, although it almost concedes it, that the voluminous record before us does contain material which affords adequate support to the Tax Court's determination of value. As is mentioned more than once in this opinion, underlying net asset value is not contested here and exceeds $11,500 per common share. There is testimony that the current assets alone yielded a net value of almost $7,000. There is opinion testimony that future earnings would approximate from $400 to $500 per common share. The Commissioner's expert testified that in his opinion the fair market value of a share of United common on December

31, 1953, was $9,000 and that he had given serious consideration to a value of $9,500 but had recognized that he was concerned with a minority interest. This evidence alone, and without further comment, justifies the Tax Court's arrival at a value of $8,506.40 per share.

It is true that the record contains nothing pinned to this exact dollar and cents figure. However, it is well settled that "Valuation * * * is necessarily an approximation * * *. It is not necessary that the value arrived at by the trial court be a figure as to which there is specific testimony, if it is within the range of figures that may properly be deduced from the evidence". *Anderson v. Commissioner*, 250 F.2d 242, 249 (5 Cir. 1957), cert. denied 356 U.S. 950; *Alvary v. United States*, 302 F. 2d 790, 795 (2 Cir. 1962); *Webster Investors, Inc. v. Commissioner*, 291 F.2d 192, 194 (2 Cir. 1962); *Commissioner v. Thompson*, 222 F.2d 893, 895 (3 Cir. 1955); *Gloyd v. Commissioner*, 63 F.2d 649, 652 (8 Cir. 1933), cert. denied 290 U.S. 633; Mertens, Law of Federal Income Taxation, Volume 10, §59.03 (1963 cumulative supplement). Such is the situation here.

The valuation of closely held stock is basically a question of judgment rather than of mathematics. We feel that the taxpayers' argument here comes down to a demand for a formula. Formulas, however, are only tools. With the kind of evidence present here, we need not, and do not, go so far as to require that a detailed computation leading to the determined value be present in the Tax Court's findings.

2. The finding as to market value. The taxpayers argue that the only valuation finding made by the Tax Court was that the United common was "not less than $8,506.40 per share"; that this is only a general statement; and that it constitutes no finding at all and is meaningless.

As the taxpayers point out, there are cases which have been remanded because the Tax Court's findings "were not sufficiently definitive", see *Showell v. Commissioner*, 238 F.2d 148, 153 (9 Cir. 1956), or because approximations generally discussed did not reveal the arithmetic applied by the court in reaching its final figure", see *Cohen v. Commissioner*, 266 F.2d 5, 12 (9 Cir. 1959). Compare the opinion of four justices in *Commissioner v. Duberstein*, supra, pp. 292-93 of 363 U.S.

In the setting of this case, however, the taxpayers' argument and their reliance on *Showell* and *Cohen* are not convincing. The Tax Court's determination here, as a practical matter, certainly equates with a finding that the value of the stock was the stated figure and not urgently hints that the taxpayers might well consider themselves fortunate that it was not higher. An identical finding was upheld in *Richardson v. Commissioner*, 151 F.2d 102, 104-05 (2 Cir. 1945), cert. denied 326 U.S. 796, although one judge expressed doubt about the actual evaluation standard employed in that case. Somewhat similar language was involved and also upheld in *Gross v. Commissioner*, 92 F.2d 621, 622 (7 Cir. 1937), although the court there felt that it was confronted with "a rather awkward expression". See, also, *Baker v. Commissioner*, 115 F.2d 987, 989 (6 Cir. 1940).

Cohen is a different kind of case for there the Commissioner's original deficiency determination was "shown to be invalid". Consequently, the presumption of its correctness had been destroyed and the Commissioner, rather than the taxpayer, had "the burden of proving whether any deficiency exists and if so the amount", p. 11 of 266 F.2d. See *Helvering v. Taylor*, 293 U.S. 507 (1935). Thus the Tax Court itself had redetermined the deficiency. In the *Hamm* case here, on the other hand, the figure is well within the range of values which find support in the testimony. The same distinction

exists as to *Gerstell v. Commissioner*, 267 F.2d 195 (9 Cir. 1959), urgently pressed upon us by the taxpayers. While there is language in that opinion which is understandably seized upon by the taxpayers here, it seems to us that the core of the holding is that the Tax Court's result rested on nothing more than sheer speculation. The case was therefore remanded "to permit the taking of further testimony to determine whether any fair market value can be found", p. 199 of 267 F.2d.

In summary, then, we think the Tax Court's finding here, although phrased in "not less than" language, possessed sufficient definiteness to meet the requirements of §7459(b) and Rule 52(a), to advise and inform the taxpayers appropriately, and to constitute an acceptable finding as to value.

3. The finding as to the value of a minority interest. Here the taxpayers assert that if the Tax Court made any finding of market value of United common it was one which related only to the value of all the common and was not a determination as to the minority interests here involved. There is no merit in this contention. The court's ultimate finding was as to "The fair market value of the 263⅓ shares of common capital stock of United Properties, Inc., which were transferred by gift * * *". This language is repeated in the opinion section of its decision. The material quoted in our footnote above contains specific references to capital structure, outstanding shares, and the number of shares transferred by these gifts. If, in view of the over all complete ownership of the common by the Hamm family, this minority interest point has any real validity, the foregoing convincingly demonstrates that this minority interest aspect was considered by the court and that its determination was made as to that specific interest.

4. The $735 per share figure. The taxpayers argue here that, because of the staggering amount of United's total contractual liability under its long term leases, liquidation was impossible as a practical matter; that to a minority shareholder liquidating value and net value of underlying assets were meaningless and of no importance; that the only things of significance to him were earnings and dividend paying capacity; that valuation on the basis of present worth of future earnings is valid; and that $735 a share, the highest possible value testified to by any witness for the taxpayer, was the valuation to be found for United common.

This narrow approach, based on future earnings and dividends, would exclude any consideration of underlying asset value. It was rejected by the Tax Court as not furnishing "a reliable criteria of the value of the shares of stock here involved".

Here again the taxpayers' argument is one more appropriately addressed to the trier of fact than to us. It did not sell itself to the Tax Court. Future earnings and dividend prospects are not the only factors having recognizable validity. United was a family company. Its history demonstrates that it was not managed with a view to dividends. Long-range appreciation, inflation hedging, and other investment considerations all seem to have been inherent in its policy. As an appellate court we cannot say that the underlying asset value is without significance. The average small investor on the street might not be attracted to United stock because of the family control and other features but an investor with knowledge, acumen, and substantial capital might be. The absence of dividends, the presence of arrearages, and the existence of sizable rental obligations over the long term are not conclusive factors in view of the nature of this corporation and of its ownership.

We therefore hold that the Tax Court's conclusion that earnings alone are not a reliable criterion of value was not improper and that its consideration of underlying asset value and of factors other than earnings and dividend prospects was justified. This is a situation where it is clearly for the Tax Court to decide the weight to be given to various factors. *In re Nathan's Estate*, supra, p. 427 of 166 F.2d; *Bank of California v. Commissioner*, 133 F.2d 428, 432 (9 Cir. 1943). The Tax Court was not compelled to accept the evidence of the taxpayers' experts as to values. "It is within its province to accept such evidence in toto, in part, or not at all. Its weight is with the trial Board and its worth is for its sound judgment to determine. It is not required to surrender its judgment to the judgment of experts". *Gloyd v. Commissioner*, supra, p. 650 of 63 F.2d; *Fitts' Estate v. Commissioner*, supra, p. 733 of 237 F.2d. We like and agree with Judge Fee's comments in *Penn v. Commissioner*, supra, p. 21 of 219 F. 2d:

> "There was no need to state the process by which valuation was attained except to make clear that all appropriate factors required by law to be taken into consideration were in fact weighed. As has been seen, [the Tax Court] stated the rule admirably and correctly. If improper weight may have been given to these elements of evaluation but the conclusion was not demonstrably wrong, an appellate court should not interfere. Congress has committed questions such as valuation to the Tax Court. This Court claims no competency in evaluation of stock or in the field of corporate accounting."

What was said there is applicable here.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.